86-450

No. A-1043

Supreme Court, U.S.
FILED
SEP 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED BROTHERHOOD OF CARPENTERS
AND JOINERS OF AMERICA,
L.U. 201 AFL-CIO, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Wichita, Kansas 67214
316/262-6461

Kristy L. Simpson
Attorney
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Wichita, Kansas 67202
316/263-6141

QUESTIONS PRESENTED

1. Does the Circuit Court of Appeals have jurisdiction to review the decision of the National Labor Relations Board General Counsel to not issue a complaint.

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v.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Richard J. Sanborn, on behalf of L.U. 201 and Kristy L. Simpson, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The order and judgment of the Court of Appeals (App. A, infra, 1a-3a) is not reported. The opinion of National Labor Relations Board General Counsel (App. B, infra 4a) is not reported. The opinion of the National Labor Relations Board Region 17 (App. C, infra, 5a-7a) is not reported.

JURISDICTION

The judgment of the Court of Appeals (App. A, infra, 1a-3a) was entered on May 5, 1986, stating there was no jurisdiction. On July 8, 1986 Associate Justice Byron R. White extended the time within which to file a petition for writ of certiorari to September 2, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall . . . be deprived of life, liberty, or property without due process of law . . .

2. Section 8(a)(5) of the National Labor Relations Act (NLRA) states:

> It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees . . .

Freedom to contract is one of the fundamental policies of the NLRA. (29 U.S.C. §151 et seq.).

STATEMENT

1. The National Labor Relations Act was created in relevant part to prohibit employers from engaging in certain specified acts determined to be unfair labor practices and to provide remedies when such unfair labor practices occurred.

Section 8(a)(5) of the act prohibits an employer from refusing to collectively bargain with the representatives of his employees.

2. The collective bargaining agreement to which the United Brotherhood of Carpenters and Joiners, Local Union 201, AFL-CIO (Local 201) and the Associated General Contractors of Wichita, Kansas, Inc., (AGC) were parties to was to expire on April 1, 1984. On June 22, 1983 AGC sent to Local 201 a proposal to enter into "exploratory" discussions, said discussions to be completed by November 30, 1983. An agreement was signed by Local 201 and AGC to enter into these exploratory discussions. The completion date was subsequently extended in writing to December 31, 1983. On July 8, 1983, Local 201 requested the assistance of a union organizer from the United Brotherhood of Carpenters and Joiners, International (Intl.). Richard Cox was sent by the state District Council of which Local 201 is not a member.

3. The terms of the preliminary negotiations were unacceptable to Local 201 in that it violated Trade Rules as stated in the Constitution of Local 201 by:

a. Creating a new class of entry-level employees with no fringe benefits;

b. Gave employer authority to make work assignments without regard to standards of trade or training and qualifications; and,

c. Fringe benefit negotiations were conditioned upon acceptance.

On February 14, 1984 Local 201 voted 179 to 9 to reject the proposed collective bargaining agreement and to strike against the purported agreement.

4. On February 16, 1984, Intl. Representative Cox unlawfully signed a "collective bargaining agreement" with AGC. Cox had never been requested to assist in negotiations

between Local 201 and AGC. No formal negotiations had ever commenced. The agreement signed by Cox contained the provisions which the Local had already voted not to accept.

5. Local 201 petitioned the National Labor Relations Board Regional Director (Director) to enjoin enforcement of the unauthorized and illegally formed contract until negotiations had begun in earnest and for an investigation of the acts of Intl. Representative Cox. The Director held, after investigation, that further proceedings on the charges were not warranted.

6. An appeal was effected to the National Labor Relations Board General Counsel (General Counsel). Said appeal was summarily denied relying on the Director's reasons for denying any further proceedings.

7. A petition for review was filed with the Tenth Circuit Court of Appeals. The National Labor Relations Board filed a motion to dismiss for lack of appellate jurisdiction. The Court of Appeals stated the decision of the General Counsel to not issue a complaint is generally not reviewable stating 3 exceptions to this general rule as:

a. When the National Labor Relations Board or its staff acted in excess of its delegated powers and contrary to a specific prohibition of the National Labor Relations act;

b. When the National Labor Relations Board action results in the violations of constitutional rights; and,

c. When the agency action is wholly without basis in law.

The motion to dismiss was sustained and the petition for review dismissed with the Court stating none of the 3 exceptions was present.

REASONS FOR GRANTING THE PETITION

This case presents an important question of the reviewability of the National Labor Relations Board General Counsel decision to not file a complaint. The Federal Courts of Appeal are in conflict over whether or not these decisions are reviewable by the Court.

The Tenth Circuit Court of Appeals has, in the matter presently before this Court, stated three situations for review of the decision of the General Counsel to not issue a complaint.

The Fifth Circuit apparently recognizes the second exception noted by the Tenth, that is, when the actions of the National Labor Relations Board results in violations of constitutional rights. *Bova v. Pipefitters and Plumbers Local 60, AFL-CIO,* 554 F.2d 226, 229 (5th Cir. 1977).

The Ninth Circuit is undecided having held the General Counsel decision to be reviewable when the agency action is wholly without basis in law. *International Association of Machinists and Aerospace Workers v. Lubbers,* 681 F.2d 598, 603 (9th Cir. 1982). The Ninth Circuit then rejected this same exception in *Baker v. Intl. Alliance of Theatrical Stage Employees and Moving Picture Operators of the U.S. and Canada,* 691 F.2d 1291, 1293 (9th Cir. 1982).

The Sixth Circuit simply states these decisions are not reviewable. *Tensing v. National Labor Relations Board,* 519 F.2d 365 (6th Cir. 1975).

The refusal of the National Labor Relations Board to enjoin the unfair labor practice complained of pursuant to 29 U.S.C. §160(j) took away from Local 201 one of the fundamental policies of the National Labor Relations Act, the

freedom to contract. The employer is not free to choose any employee representative that he wants. *Porter v. National Labor Relations Board,* 397 U.S. 99, 25 L.Ed 2d 146, 90 S. Ct. 821 (1970).

Petitioners have been deprived of a property right and of their freedom to contract. Petitioners were prohibited from collective bargaining and are bound by a purported collective bargaining agreement between their employer and an individual who was without authority to bind Local 201. The action of the General Counsel was, therefore, arbitrary and petitioners constitutional rights and rights under the National Labor Relations Act have been violated.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

/s/ Richard Sanborn
Richard J. Sanborn
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2110 E. Douglas Avenue
Wichita, Kansas 67214
316/262-6461

Kristy L. Simpson
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Wichita, Kansas 67202
316/263-6141

August, 1986

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, L.U. 201 AFL - CIO,	)	No. 84-1831
Petitioner,	)	Petition for Review of an Order of the National Labor Relations Board (Nos. 17-CA-12108 and 17-CB-2889)
v.	)	
NATIONAL LABOR RELATIONS BOARD,	)	
Respondent.	)	

ORDER AND JUDGMENT

Before McKAY and SEYMOUR, Circuit Judges.

In accordance with 10th Cir. R. 9(e) and Fed. R. App. P. 34(a), this petition for review came on for consideration on the briefs and record.

This matter is before the court on respondent's motion to dismiss for lack of appellate jurisdiction and petitioner's response thereto.

The United Brotherhood of Carpenters and Joiners of America, Local Union No. 201, AFL-CIO (the Local) brought charges of unfair labor practices against the United Brother-

hood of Carpenters and Joiners of America International, AFL-CIO, and the Associated General Contractors of Wichita. After the investigations taken by the Regional Director for the Board's Seventeenth Region, the Regional Director found insufficient evidence to warrant issuing a complaint.

Subsequently, the Local appealed the Regional Director's refusal to issue the complaint to the General Counsel of the National Labor Relations Board (NLRB). The General Counsel issued his decision denying the appeal "substantially for the reasons set forth in the Regional Director's letter dated April 30, 1984."

The Local then appealed the General Counsel's refusal to issue the complaints to this court. The Local alleges that the NLRB made inadequate findings of fact to support their decision to address the issues arising from the case. The NLRB's decision not to issue the complaints, therefore, was arbitrary and capricious.

Regardless of the merits of the Local's allegations, this court does not have jurisdiction to review the General Counsel's decision not to issue the complaints. Such decisions are not generally reviewable. *See e.g., Detroit Edison Co. v. NLRB,* 440 U.S. 301, 316 (1979); *NLRB v. Sears Roebuck & Co.,* 421 U.S. 132, 138 (1975); *Vaca v. Sipes,* 386 U.S. 171, 182 (1967); *Baker v. International Alliance of Theatrical Stage Employees and Moving Picture Operators of the United States and Canada,* 691 F.2d 1291, 1293 (9th Cir. 1982).

There are three narrow exceptions, however, to this broad proposition. Direct judicial review may be permitted when the Board or its staff has acted "in excess of its delegated powers and contrary to a specific prohibition of the Act

(National Labor Relations Act)," *Leedom v. Kyne,* 358 U.S. 184, 188 (1958), or when the Board's action results in the violations of constitutional rights, *see Bova v. Pipefitters & Plumbers Local 60, AFL-CIO,* 554 F.2d 226, 229 (5th Cir. 1977), or when the agency action is wholly without basis in law, *see International Ass'n of Machinists & Aerospace Workers v. Lubbers,* 681 F.2d 598, 603 (9th Cir. 1982); *but see Baker v. International Alliance, supra* at 1296 (rejecting this third exception).

None of these situations is present here. For this reason the petition for review must be dismissed.

PETITION DISMISSED.

The mandate shall issue forthwith.

/s/ Robert L. Hoecker
Robert L. Hoecker, Clerk

BEST AVAILABLE COPY

APPENDIX B

NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570

JUN 04 1984

May 31, 1984

Re: Associated General Contractors
of Wichita, Inc.
Case No. 17-CA-12108

United Brotherhood of Carpenters &
Joiners of America-Int'l AFL-CIO
(UBC Int'l) (Associated General
Contractors of Wichita, Inc., (AGC))
Case No. 17-CB-2889

Richard Sanborn, Esq.
Professional Arts Bldg.
2110 East Douglas
Wichita, Kansas 67214

Dear Mr. Sanborn:

Your appeal in the captioned cases has been carefully considered.

The appeal is denied substantially for the reasons set forth in the Regional Director's letter dated April 30, 1984.

Very truly yours,

Wilford W. Johansen
Acting General Counsel

By /s/ Mary M. Shanklin
Mary M. Shanklin, Director
Office of Appeals

cc: Director, Region 17
Associated General Contractors of Wichita, Inc., (AGC),
Attn: Mr. Tom Slattery, Mgr., 200 West 33rd St.,
Topeka, Kansas 66611

United Brotherhood of Carpenters & Joiners of America-Int'l AFL-CIO (UBC Int'l), Attn: Mr. Patrick Campbell, Gen.. Pres., 101 Constitution Ave., N.W., Washington, D.C. 20001

United Brotherhood of Carpenters & Joiners of America-Int'l AFL-CIO (UBC Int'l), Attn: Mr. Richard Cox, Int'l Rep., 1002 North Kurzwell Raymore, Missouri 64083

Local 201, United Brotherhood of Carpenters and Joiners of America AFL-CIO, 1215 Carey Lane, Wichita, Kansas 67217

Joseph Moreland, Esq., Blake & Uhlig, P.A., 475 New Brotherhood Bldg., Kansas City, Kansas 66101

APPENDIX C

NATIONAL LABOR RELATIONS BOARD
REGION 17
616 Two Gateway Center, Fourth at State
Kansas City, Kansas 66101
Telephone: (913) 236-3855
or 236-3846

MAY 2 1984

April 30, 1984

CERTIFIED - RETURN RECEIPT REQUESTED

Richard Sanborn, Attorney
Professional Arts Building
2110 East Douglas
Wichita, Kansas 67214

Re: ASSOCIATED GENERAL CONTRACTORS
OF WICHITA, INC.
Case 17-CA-12108

UNITED BROTHERHOOD OF CARPENTERS
& JOINERS OF AMERICA-INTERNATIONAL
AFL-CIO (UBC INT'L).
(Associated General Contractors
of Wichita, Inc. (AGC))
Case 17-CB-2889

Dear Mr. Sanborn:

The above-captioned cases charging violations under Section 8 of the National Labor Relations Act, as amended, have been carefully investigated and considered.

As a result of the investigation, it does not appear that further proceedings on the charges are warranted. There is insufficient evidence to show that either the Employer Association or the Union violated the Act by entering into a collective-bargaining agreement. In this connection, it was noted that the Constitution and Laws of the United Brotherhood of Carpenters and Joiners of America, by which the Charging Party was bound, specifically gave the international repre-

sentative of the International Union controlling authority to execute a binding agreement with the Employer Association. Thus, the Charging Party requested the assistance of the International Union. Such assistance was provided by International Representative Cox. The General President of the International Union, pursuant to the constitution, thereafter authorized Cox to execute the agreement. Under such circumstances, the constitution provides that the Local Union, the Charging Party, is bound by the agreement. In addition to the actual authority vested in Cox pursuant to the constitution, Cox was also cloaked with apparent authority to negotiate and execute a collective-bargaining agreement, inasmuch as he conducted all discussions on behalf of the Charging Party leading to an agreement, with the acquiescense of the Charging Party's other representatives.

With respect to an allegation of possible willful deception on the part of the International Union, it appears that Cox informed the Charging Party that he intended to sign the agreement an appreciable length of time before the agreement was actually executed. In this connection, the Charging Party's apparent attempts to dissuade and even to enjoin Cox reveal that Cox had clearly indicated his intent to sign the agreement. Moreover, Cox' expressed intention to sign the agreement was only forthcoming after the Employer Association expressed an intent to dissolve the multi-employer bargaining association; this possible dissolution was an item mentioned by the Charging Party's representative as a reason for its initial request for assistance from the International Union.

Cases 17-CA-12108
17-CB-2889

April 30, 1984

While it appears that the membership of the Charging Party thereafter voted not to ratify the proposed agreement, the Act does not require that a membership vote be secured prior to the execution by a collective bargaining representative of a collective bargaining agreement.

The agreement which was ultimately executed appears to be a full and complete agreement, parallel in scope to the previous agreement, with no issues specifically reserved for further discussion. Hence it does not appear that the Employer Association has unlawfully failed or refused to bargain with the Charging Party. According, I am refusing to issue a complaint in these matters.

See attached copy of Form NLRB-4938 for the procedure applicable for filing an appeal.

Very truly yours,

/s/ Thomas C. Hendrix
Thomas C. Hendrix
Regional Director

TCH:cal
Enc.
cc: Associated General Contractors of
Wichita, Inc. (AGC)
Attn: Tom Slattery, Manager
200 West 33rd Street
Topeka, Kansas 66611

Cases 17-CA-12108
17-CB-2889

April 30, 1984

United Brotherhood of Carpenters & Joiners
of America-International AFL-CIO (UBC Int'l.)
Attn: Patrick Campbell, General President
101 Constitution Avenue, N.W.
Washington, D.C. 20001

cc: United Brotherhood of Carpenters & Joiners
of America-International AFL-CIO (UBC Int'l.)
Attn: Richard Cox, International Representative
1002 North Kurzwell
Raymore, Missouri 64083

Local #201, United Brotherhood of Carpenters
and Joiners of America AFL-CIO
1215 Carey Lane
Wichita, Kansas 67217

Joseph Moreland, Attorney
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Supreme Court, U.S.
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OCTOBER TERM, 1986

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL UNION 201, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROSEMARY M. COLLYER
General Counsel
National Labor Relations Board
Washington, D.C. 20570

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-450

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL UNION 201, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

Petitioner asserts that it is entitled to judicial review of the refusal of the General Counsel of the National Labor Relations Board to issue an unfair labor practice complaint.

1. In early 1984, petitioner filed unfair labor practice charges with the National Labor Relations Board against the United Brotherhood of Carpenters and Joiners International Union and the Associated General Contractors of Wichita, Inc., a multi-employer association. The charges alleged that the International Union and the employer association had unlawfully entered into a collective bargaining agreement that bound petitioner. Pet. App. C1-C3.

Following an investigation, the Board's regional director notified petitioner that "[t]here is insufficient evidence to show that either the Employer Association or the Union

violated the [National Labor Relations] Act by entering into a collective-bargaining agreement" (Pet. App. C1). He observed that the International Union's Constitution, which bound petitioner, gave the representative of the International Union "controlling authority to execute a binding agreement with the Employer Association" and that, in addition, the representative "was * * * cloaked with apparent authority to negotiate and execute a collective-bargaining agreement" under the circumstances of this case (*id.* at C2). The regional director also rejected petitioner's claims that the International Union deceived petitioner regarding its intent to sign the agreement and found that the Employer Association did not unlawfully refuse to bargain with petitioner (*id.* at C2-C3). The regional director accordingly declined to issue a complaint in response to petitioner's charges (*id.* at C3). Petitioner appealed to the Board's General Counsel, who upheld the regional director's refusal to issue a complaint "substantially for the reasons set forth in the Regional Director's letter dated April 30, 1984" (*id.* at B1).

The court of appeals unanimously dismissed the petition for review filed by petitioner (Pet. App. A1-A3). The court concluded that it lacked jurisdiction to review the General Counsel's decision not to issue a complaint, observing that "[s]uch decisions are not generally reviewable" (*id.* at A2). The court suggested that judicial review of the General Counsel's decision not to issue a complaint might be available in certain limited situations—if the decision were " 'contrary to a specific prohibition of the Act,' " if it resulted in the violation of constitutional rights, or if it were "wholly without basis in law"—but noted that "[n]one of these situations is present here" (*id.* at A2-A3 (citation omitted)).

2. The decision of the court below is correct and does not conflict with any decision of this Court or another court of appeals. Further review by this Court is not warranted.

Section 10(f) of the National Labor Relations Act, 29 U.S.C. 160(f), endows the courts of appeals with jurisdiction to review "final order[s] of the Board." The General Counsel's refusal to issue an unfair labor practice complaint does not constitute a final Board order subject to judicial review under Section 10(f). *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 155 (1975); *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967). Nor is the General Counsel's refusal to issue a complaint reviewable in federal district court pursuant to the general grant of jurisdiction over cases raising a federal question (see 28 U.S.C. 1331). The Administrative Procedure Act (APA) specifies that judicial review of agency action is not available when "agency action is committed to agency discretion by law" (5 U.S.C. 701(a)(2)). The General Counsel's decision not to issue a complaint is a decision committed to her prosecutorial discretion; judicial review is therefore precluded by Section 701(a)(2). *Vaca* v. *Sipes*, 386 U.S. at 182; see also *Heckler* v. *Chaney*, No. 83-1878 (Mar. 20, 1985), slip op. 9.

Contrary to petitioner's assertion (Pet. 5), there is no conflict among the courts of appeals concerning the question presented in this case. Some courts have indicated, in dicta, that the General Counsel's refusal to issue a complaint might be reviewable in particular limited circumstances. See, *e.g.*, Pet. App. A2-A3; *International Association of Machinists* v. *Lubbers*, 681 F.2d 598, 603-604 (9th Cir. 1982); *Bova* v. *Pipefitters & Plumbers Local 60*, 554 F.2d 226, 228-229 (5th Cir. 1977). But those statements are not implicated here because, as the court of appeals observed (Pet. App. A3), this case involves no circumstances that even arguably fall within these purported grounds for review.*

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*The question presented here is unrelated to the questions presented in *NLRB* v. *United Food & Commercial Workers, Local 23*, petition for cert. pending, No. 86-594. That case involves the reviewability of the

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

ROSEMARY M. COLLYER
General Counsel
National Labor Relations Board

NOVEMBER 1986

General Counsel's decision to withdraw a complaint pursuant to an informal settlement agreement and the General Counsel's obligation to hold a hearing prior to withdrawing a complaint. Resolution of the issues presented in *United Food & Commercial Workers* does not require reexamination of the settled principle that the General Counsel's refusal to issue a complaint in the first instance is not subject to judicial review; indeed, the question in that case is whether the policies underlying that settled principle also bar review of the General Counsel's decision to withdraw a complaint. Accordingly, there is no reason for the Court to hold the petition in the present case pending the disposition of *United Food & Commercial Workers*.

DOJ-1986-11